TAN KOK SIANG v. KEMUNING SETIA SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
[CIVIL APPEAL NO: P-02 (NCVC)(W)-1527-08-2016]
16 OCTOBER 2017

CONTRACT: *Breach – Employment contract – Term in contract that employee required to serve employer until completion of project – Employee played key role in procuring necessary approvals of local authority for planning and building plans – Employee received discount for purchase of house while in tenure – Employee resigned before completion of project – Whether employee's resignation premature – Whether employee in breach of fundamental term of employment contract – Whether discount for house purchase ought to be returned and refunded – Contracts Act 1950, ss. 40, 65 & 66*

CONTRACT: *Agreement – Sale and purchase agreement – Employee entered into sale and purchase agreement with employer for purchase of house – Employee received discount for purchase of house while in tenure – Employee resigned before completion of project – Whether employee's sale and purchase agreement distinct from employment contract – Whether discount for house purchase ought to be returned and refunded – Contracts Act 1950, ss. 40, 65 & 66*

The respondent, a housing developer, and the appellant had two contractual relationships. The first contractual relationship was *via* an oral contract made in 2009. In this oral contract, the Chief Executive Officer ('PW1') of the respondent approached the appellant with an offer that the appellant work as its project manager in its housing project ('the project'). The appellant was required to serve as project manager until the completion of that project ('the employment contract'). During his tenure as project manager, the appellant played a key role of, *inter alia*, liaising with (i) relevant authorities in procuring the necessary approvals of the local authority for planning and for building plans; and (ii) various persons such as the consultants for the project, the landowners and solicitors and also generally assisted in the eviction of squatters of the land so that the project could be built. The second contractual relationship arose in 2013 when the appellant purchased from the respondent one unit of a 3-storey terrace house in the project by way of a sale and purchase agreement ('the SPA'). For this purchase, the respondent gave the appellant a discount of RM500,000 off the purchase price of RM1,068,000. However, the appellant resigned before the project was completed. The appellant's resignation was accepted by PW1 without protest. A year later, PW1 demanded from the appellant the refund of the discount of RM500,000 with interest as the appellant had resigned prematurely. When the appellant refused to refund the RM500,000, the respondent initiated a claim against the latter at the High Court. The

A appellant counterclaimed for payment of the balance of agreed remuneration, delivery of vacant possession of the property under the SPA and liquidated damages. The High Court allowed the respondent's claim and ordered a refund of RM500,000 after finding that the appellant was in breach of the employment contract. The appellant's counterclaim was dismissed on the B basis that the appellant was not entitled to the delivery of vacant possession and liquidated damages. The High Court Judge ('the HCJ') held that (i) the appellant had breached his promise; (ii) when he resigned prematurely, the appellant agreed he had disabled himself from performing his promise in its entirety; and (iii) the respondent was entitled to apply s. 40 of the Contracts C Act 1950 ('the Act'). Hence, the present appeal.

Held (dismissing respondent's claim and allowing appellant's counterclaim)
Per Mary Lim JCA delivering the judgment of the court:

D **(1)** The HCJ's findings, views and application of s. 40 of the Act was plainly erroneous and must be set aside. The appellant had agreed to be the project manager until the project was completed; and it was at that point in time that he will be paid. It was in that sense that the HCJ understood the contract was 'for' its entirety. The fact that the payment was in the form of an advance did not alter that agreement. In the HCJ's E understanding, the 'entirety' of the contract referred to the appellant staying until the end of the project. Until and unless the project was completed, the appellant could not leave and would not be paid or be entitled to any payment. Therefore, by all accounts, leaving any sooner would amount to a repudiation of contract entitling the respondent to F rescind the contract. This conclusion and understanding by the HCJ was plainly erroneous and demonstrated a misapprehension of s. 40 of the Act. (paras 11, 14 & 15)

(2) In order to determine the rights and obligations of the parties, the terms of the oral contract would have to be established. The HCJ was obliged G to determine not just the promise or what the promise was all about, but also the terms surrounding that promise. Of course, if there were none, it would be proper for the HCJ to rightly say that the promise and thereby the contract was only about the appellant working as the respondent's project manager until the project was completed at which H time the respondent would pay the appellant RM500,000. Because the employment contract was an oral contract, the HCJ must test the oral testimonies against any contemporaneous documents produced and admitted at trial, and explain why one set of evidence was preferred over the other. (para 25)

I **(3)** The contemporaneous documents referred to by the HCJ was the respondent's notice of demand which was unanswered by the appellant. The notice of demand was not contemporaneous documentary evidence of the employment contract. This notice was issued in anticipation of a

civil claim. It was incumbent on the HCJ to inquire as to the terms and conditions of the employment contract, what were the particular functions of a project manager, whether there was any truth or explanation as to the matters relied on by the appellant. The employment contract could not be about being a project manager for a duration. That engagement must logically and reasonably entail certain responsibilities and functions required of the appellant as project manager. These matters required examination in order to answer the issue of fundamental terms. Had the HCJ examined the evidence properly, Her Ladyship would have found that the respondent did not dispute the functions described by the appellant that, in fact, the respondent agreed that the appellant was responsible for and had procured the necessary approvals and re-approvals when the plans were amended. (paras 31 & 32)

(4) The planning permission, an amended building plan and the minutes of meetings were silent, incontrovertible, independent and contemporaneous documentary evidence which the HCJ failed to have given any due regard. These pieces of evidence supported the appellant's version of the terms of the employment contract, that he was engaged not just as project manager but as the person responsible for liaising with the relevant authorities so that the relevant approvals necessary for the project may be procured. This role is indeed an important role for the appellant as the lack of approvals would have adverse implications on the progress of the project. The HCJ did not give any weight to these evidence but instead, focused almost completely on the question of duration of the employment. This was erroneous given that this was an oral contract and it was incumbent upon the HCJ to ascertain the precise terms of the contract. (paras 33 & 34)

(5) There was an irresistible inference offered by the SPA which supported the appellant's case, which evidence was ignored by the HCJ. The SPA for the sale of the 3-storey house to the appellant and the documents issued in relation to the SPA were more consistent with the appellant's version of the terms of the agreement. This was not considered by the HCJ. The dates of the SPA, credit note and the letter to the lawyers for the SPA indicating that RM500,000 was discounted from the sale of the property with a credit note for the balance were events which took place long after the employment contract had come into existence in 2009. All this showed that the terms of the employment contract were as explained by the appellant. (para 35)

(6) The appellant's promise to stay until the end of the project was not a term which was fundamental to or was at the root of the employment contract. What was fundamental were the significant responsibilities that the appellant was entrusted with and which he had attended to successfully. Consequently, while the appellant may have left the

A respondent's employment at a date earlier than anticipated, he was not in breach of a fundamental term when he left. On examination of the reasons for that action, it was apparent that the appellant's decision to leave was brought about by the respondent's own breach in not paying the appellant the agreed sum of RM1 million, after he had substantially
B and successfully performed the duties expected of him. As the party in breach, the respondent was not entitled to terminate the contract. (para 36)

(7) What was further overlooked by the HCJ was the fact that even if for a moment the respondent had a right to terminate, the respondent
C waived that right when it accepted the appellant's resignation without reservation or terms. The respondent's demand, issued more than a year later, was more in the nature of an afterthought. Consequently, the respondent was not entitled to terminate the oral employment contract and to a refund of the advance. Furthermore, the respondent had not
D adduced any evidence of loss. The sum of RM500,000 could not be ordered to be returned under ss. 65 and 66 of the Act given that the validity of the oral contract was never in issue. (paras 37 & 38)

(8) The counterclaim for delivery of vacant possession was dismissed by the HCJ on the basis that the appellant was disentitled to his claim under
E the SPA by reason of his conduct under the employment contract. This determination was clearly erroneous on the facts and in law. The arrangements between the parties in relation to the SPA were entirely separate and distinct from those that arise under the employment contract. The respondent's failure and refusal to deliver vacant
F possession under the SPA to the appellant amounted to a breach of the clear terms of the SPA. Even if the appellant was in breach of the oral employment contract, which was not the case, that breach was unrelated to the respondent's obligations under the SPA. The appellant was entitled to an order for specific performance of the terms of the SPA. The respondent was obliged to hand over vacant possession and pay
G liquidated damages for the late delivery. (paras 40, 41, 43 & 44)

Bahasa Malaysia *Headnotes*

Responden, pemaju perumahan, dan perayu mempunyai dua hubungan kontraktual. Hubungan kontraktual pertama adalah melalui kontrak lisan
H yang dibuat pada 2009. Dalam kontrak lisan ini, Ketua Pegawai Eksekutif ('PW1') responden menemui perayu dengan tawaran agar perayu bekerja sebagai pengurus projek hingga penyempurnaan projek tersebut ('kontrak perkhidmatan'). Semasa bertugas sebagai pengurus projek, perayu memainkan peranan penting iaitu, antara lain, menjadi perantara (i) pihak
I berkuasa yang relevan dalam memperoleh kebenaran yang perlu daripada pihak berkuasa tempatan bagi pelan perancangan dan bangunan; dan (ii) pelbagai orang seperti perunding projek, pemilik-pemilik tanah dan peguam cara dan, amnya, membantu mengusir setinggan-setinggan tanah

tersebut agar projek boleh dibina. Hubungan kontraktual kedua timbul pada 2013 apabila perayu membeli, daripada responden, satu unit rumah teres tiga tingkat bawah projek tersebut melalui perjanjian jual beli ('PJB'). Bagi belian ini, responden memberi perayu diskaun sebanyak RM500,000 daripada harga belian sebanyak RM1,068,000. Walau bagaimanapun, perayu meletak jawatan sebelum projek disempurnakan. Peletakan jawatan perayu diterima oleh PW1 tanpa bantahan. Setahun kemudian, PW1 menuntut pemulangan diskaun RM500,000 dengan faedah, daripada perayu, kerana perayu meletak jawatan secara pra-matang. Apabila perayu enggan memulangkan jumlah RM500,000 tersebut, responden memulakan tuntutan terhadapnya di Mahkamah Tinggi. Perayu menuntut balas bayaran baki gaji yang disetujui, serahan milikan kosong hartanah bawah PJB dan ganti rugi jumlah tertentu. Mahkamah Tinggi membenarkan tuntutan responden dan memerintahkan pemulangan RM500,000 selepas memutuskan perayu melanggar kontrak perkhidmatan. Tuntutan balas perayu ditolak atas alasan perayu tidak berhak mendapat serahan milikan kosong dan ganti rugi jumlah tertentu. Hakim Mahkamah Tinggi ('HMT') memutuskan (i) perayu melanggar janjinya; (ii) apabila perayu meletak jawatan secara pra-matang, perayu bersetuju dia menarik diri daripada memenuhi janjinya secara keseluruhan; dan (iii) responden berhak mengguna pakai s. 40 Akta Kontrak 1950 ('Akta'). Maka timbul rayuan ini.

Diputuskan (menolak tuntutan responden dan membenarkan tuntutan balas perayu)

Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Dapatan, pandangan dan pemakaian s. 40 Akta oleh HMT jelas terkhilaf dan mesti dibetulkan. Perayu bersetuju menjadi pengurus projek hingga projek disempurnakan; dan pada waktu tersebutlah dia akan dibayar. Dalam erti kata inilah HMT memahami kontrak tersebut secara keseluruhannya. Fakta bayaran dalam bentuk pendahuluan tidak mengubah perjanjian. Pemahaman HMT adalah 'keseluruhan' kontrak merujuk pada perayu kekal hingga projek tamat dan tidak akan dibayar atau berhak mendapat bayaran. Oleh itu, dalam semua keadaan, meletak jawatan lebih awal akan terjumlah sebagai penolakan kontrak yang memberi responden hak membatalkan kontrak. Kesimpulan dan pemahaman oleh HMT jelas terkhilaf dan mempamerkan salah faham s. 40 Akta.

(2) Untuk memutuskan hak dan kewajipan pihak-pihak, terma kontrak lisan perlu dibuktikan. Hakim Mahkamah Tinggi berkewajipan memutuskan bukan sahaja janji atau perihal janji ini, tetapi juga terma-terma yang mengawal selia janji ini. Sudah tentu, jika tiada, adalah betul untuk HMT mengatakan bahawa janji dan, bersangkutan itu, kontrak hanyalah tentang perayu bekerja sebagai pengurus projek responden hingga projek ini disempurnakan yang selepas itu, responden akan membayar perayu RM500,000. Oleh kerana kontrak perkhidmatan adalah kontrak lisan,

A HMT mesti menguji keterangan-keterangan lisan dengan dokumen-dokumen semasa yang dikemukakan dan diterima semasa perbicaraan dan menjelaskan kenapa satu set keterangan dipilih berbanding yang satu lagi.

B **(3)** Dokumen semasa yang dirujuk oleh HMT adalah notis tuntutan responden yang tidak berjawab oleh perayu. Notis tuntutan ini bukan keterangan dokumentar semasa kontrak perkhidmatan. Notis ini dikeluarkan dengan jangkaan kontrak perkhidmatan. Hakim Mahkamah Tinggi berkewajipan bertanya tentang terma dan syarat kontrak perkhidmatan, fungsi-fungsi khusus pengurus projek, sama ada terdapat C kebenaran atau penjelasan tentang hal-hal perkara yang menjadi sandaran perayu. Kontrak perkhidmatan tidak boleh memperihalkan tentang menjadi pengurus projek bagi satu tempoh. Secara logik dan munasabah, pelantikan mestilah melibatkan beberapa tanggungjawab dan fungsi yang dikehendaki oleh perayu sebagai pengurus projek. Hal-D hal perkara ini mengkehendaki pemeriksaan untuk menjawab isu tempoh asas. Jika HMT memeriksa keterangan ini dengan betul, beliau akan mendapati responden tidak mempertikaikan fungsi-fungsi yang dinyatakan oleh perayu; bahawa, responden bersetuju bahawa perayu bertanggungjawab dan berjaya mendapatkan kebenaran dan kebenaran semula yang diperlukan apabila pelan-pelan dipinda.

E

(4) Kebenaran merancang, pelan bangunan yang dipinda dan minit mesyuarat adalah keterangan dokumentar yang senyap, tidak boleh disangkal, bebas dan semasa yang HMT gagal pertimbangkan sewajarnya. Cebisan-cebisan keterangan ini menyokong versi perayu F tentang terma-terma kontrak perkhidmatan, bahawa dia dilantik bukan sahaja sebagai pengurus projek tetapi juga orang yang bertanggungjawab menjadi perantara dengan pihak-pihak berkuasa yang relevan agar kebenaran-kebenaran relevan yang diperlukan bagi projek boleh diperoleh. Peranan ini sememangnya penting buat perayu kerana ketiadaan kebenaran akan mempunyai implikasi buruk terhadap progres G projek tersebut. Hakim Mahkamah Tinggi tidak memberi pemberatan pada keterangan ini tetapi, sebaliknya, memfokuskan hampir kesemuanya pada persoalan tempoh perkhidmatan. Ini satu kekhilafan kerana ini satu kontrak lisan dan HMT berkewajipan mengenal pasti tempoh spesifik kontrak. Selain itu, tidak boleh dinafikan bahawa H terdapat pelaksanaan besar kontrak perkhidmatan oleh perayu.

(5) Terdapat kesimpulan yang tidak terbendung oleh PJB yang menyokong kes perayu dan keterangan ini diabaikan oleh HMT. Perjanjian jual beli rumah tiga tingkat tersebut kepada perayu dan dokumen-dokumen yang I dikeluarkan berkaitan PJB ini lebih selaras dengan versi perayu tentang tempoh perjanjian. Ini tidak dipertimbangkan oleh HMT. Tarikh-tarikh PJB, nota kredit dan surat kepada peguam cara PJB menunjukkan

diskaun RM500,000 diberi untuk jualan hartanah dengan nota kredit kerana bakinya adalah peristiwa-peristiwa yang berlaku lama sebelum kontrak perkhidmatan wujud pada 2009. Semua ini menunjukkan terma-terma kontrak perkhidmatan adalah seperti yang dijelaskan oleh perayu.

(6) Janji perayu untuk kekal hingga projek tamat bukan terma asas atau akar umbi kontrak perkhidmatan. Yang penting adalah tanggungjawab besar yang diamanahkan kepada perayu yang kesemuanya telah dijalankan. Akibatnya, walaupun perayu mungkin telah meletak jawatan pada tarikh yang lebih awal dari yang dijangka, dia tidak melanggar terma asas semasa meletak jawatan. Setelah memeriksa alasan-alasan bagi tindakan ini, jelas bahawa keputusan perayu untuk meletak jawatan disebabkan oleh pelanggaran responden sendiri kerana tidak membayar kepada perayu jumlah yang disetujui sebanyak RM1 juta, selepas dia berjaya menjalankan tanggungjawab yang dijangka daripadanya. Sebagai pihak yang melanggar, responden tidak berhak menamatkan kontrak.

(7) Hakim Mahkamah Tinggi terlepas pandang fakta bahawa jika pun, buat seketika, responden mempunyai hak penamatan, responden mengetepikan hak ini apabila menerima peletakan jawatan perayu tanpa teragak-agak atau terma. Tuntutan responden, dikeluarkan lebih setahun kemudian, lebih bersifat fikiran terkemudian. Akibatnya, responden tidak berhak menamatkan kontrak lisan perkhidmatan dan mendapat pulangan pendahuluan. Tambahan lagi, responden tidak mengemukakan apa-apa keterangan kerugian. Jumlah RM500,000 tidak boleh diperintahkan untuk dipulangkan bawah ss. 65 dan 66 Akta memandangkan kesahan kontrak lisan tidak pernah dipertikaikan.

(8) Tuntutan balas bagi serahan milikan kosong ditolak oleh HMT atas alasan perayu tidak berhak mendapat tuntutannya bawah PJB kerana tindakannya bawah kontrak perkhidmatan. Pemutusan ini jelas terkhilaf berdasarkan fakta dan bawah undang-undang. Perancangan antara pihak-pihak berkenaan PJB adalah terasing sepenuhnya dan berbeza dengan apa-apa yang timbul bawah kontrak perkhidmatan. Kegagalan dan keengganan responden menyerahkan milikan kosong bawah PJB terjumlah sebagai pelanggaran nyata terma-terma PJB. Jika pun perayu melanggar kontrak lisan perkhidmatan, dan ini tidak berlaku, pelanggaran ini tiada kaitan dengan kewajipan responden bawah PJB. Perayu berhak mendapat perintah pelaksanaan spesifik terma-terma PJB. Responden berkewajipan menyerahkan milikan kosong dan membayar ganti rugi jumlah tertentu bagi penyerahan lewat.

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA ***(refd)***

Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd; Soo Yuh Mian (Intervener) [2011] 3 CLJ 16 CA ***(refd)***

A *Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC* ***(refd)***
Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***
Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 CA ***(refd)***
Muralidhar Chatterjee v. International Film Co Ltd AIR 1943 30 PC ***(refd)***
B *Ramli Shahdan & Anor v. Motor Insurer's Bureau Of West Malaysia & Anor [2006] 1 CLJ 224 CA* ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***
Su Wee Lip @ Philip Su v. Hj Lassim Abdul Rahman [2009] 1 MLJ 580 ***(refd)***

Legislation referred to:
C Contracts Act 1950, ss. 40, 65, 66, 74
Housing Development (Control And Licensing) Act 1966, s. 24
Housing Development (Control And Licensing) Regulations 1989, reg. 11, Schedule G

The Indian Contract Act 1873 [Ind], s. 39

D **Other source(s) referred to:**
Pollack & Mulla, *Indian Contract and Specific Relief Acts*, 12th edn vol 1, p 1000
Visu Sinnadurai, *Law of Contract*, 4th edn, Lexis Nexis, pp 938-941

For the appellant - Simon Murali & Jamie Ting Cheng Ning; M/s Lio & Partners
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E *[Editor's note: For the High Court judgment, please see Kemuning Setia Sdn Bhd v. Tan Kok Siang [2016] 1 LNS 1413 (overruled).]*

Reported by Najib Tamby

F **JUDGMENT**

Mary Lim JCA:

Background

[1] In the claim before the High Court, the respondent, a housing
G developer and the appellant, an individual, had two contractual relationships.

[2] The first was *via* an oral contract made in 2009. In this oral contract, Tan Swee Leong (PW1), better known as Steven Tan, the Chief Executive Officer (CEO) of the respondent approached the appellant with an offer that
H the appellant work as its project manager in its housing project known as 98 Greenlane Lintang Gangsa (the project). The appellant was required to serve as project manager until the completion of that project. For ease of reference, this will be referred to as the 'employment contract'.

I

[3] The amount of consideration under this employment contract is disputed. The appellant maintains that it was for RM1 million whereas the respondent claimed that it was for RM500,000. The respondent claimed that it had advanced the appellant this sum of RM500,000 *via* a discount for the same amount in the second contractual relationship between the parties.

[4] The second contractual relationship between the parties arose when the appellant purchased from the respondent one unit of 3-storey terrace house in the project *vide* sales and purchase agreement dated 10 January 2013. For this purchase, the respondent gave the appellant a discount of RM500,000 off the purchase price of RM1,068,000. A credit note was issued on 12 May 2014. The appellant took out a housing loan to finance the payment of the balance of the purchase price. This second contractual arrangement will be referred to as the 'sales and purchase agreement' (SPA).

[5] The appellant resigned before the project was completed. He resigned on 17 July 2014 after having worked for the respondent for five years. His letter of resignation was accepted by PW1, without protest.

[6] It is not in dispute that during his tenure as project manager, the appellant played a key role. Amongst others, the appellant liaised with the relevant authorities in procuring the necessary approvals of the local authority for planning and for building plans, liaised with various persons such as the consultants for the project, the landowners and solicitors and also generally assisted in the eviction of squatters on the land so that the project could be built.

[7] A year after the appellant resigned, PW1 met the appellant at Starbucks Café at Seagate, Penang. There, PW1 informed the appellant that the respondent wanted the appellant to refund the discount of RM500,000 together with interest because the appellant had resigned prematurely. PW1 also suggested the appellant sell the 3-storey terrace house as the value of the house was said to be in the region of RM1.3 million. According to PW1, the respondent wanted the refund because it was disappointed and shocked with the appellant's resignation as he had left the respondent's employment at a time when his services was most needed. The respondent was left in a quandary and the appellant's resignation had delayed the respondent's project. PW1 testified that the respondent decided to wait for the project to complete before claiming the refund from the appellant. The project was completed in March 2015; it was then ready for delivery. When the appellant refused to refund the RM500,000, the respondent sued.

[8] The appellant counterclaimed for payment of the balance of agreed remuneration, delivery of vacant possession of the property under the SPA, and liquidated damages.

A **Decision Of The High Court**

[9] The learned High Court Judge allowed the respondent's claim and ordered a refund of the RM500,000 after finding that the appellant was in breach of the employment contract. The counterclaim was dismissed on the basis that the appellant was not entitled to delivery of vacant possession and
B liquidated damages. The learned High Court Judge found that since the appellant had refused to perform the employment contract in its entirety, the appellant had in fact repudiated the contract and was not entitled to payment under s. 40 of the Contracts Act 1950. Consequently, the appellant's argument that he had substantially performed part of the contract, as much
C as 90% and hence is entitled to keep the money, was rejected by the learned judge. According to the learned judge:

> The concern of the Court is not what the defendant has performed. But what he has promised. In this case, the defendant has admitted he had breached his promise. When he resigned prematurely, the defendant
D agreed he had disabled himself from performing his promise in its entirety. The effect of which, the plaintiff is entitled to apply section 40 of the Contracts Act 1950 and put an end to the agreement.

[10] The learned judge proceeded to find that the respondent had rightly accepted the appellant's repudiation, "and the contract no longer exists.
E Since the defendant is not entitled to gain any benefit under the contract, he had to return the said RM500,000 to the plaintiff pursuant to s. 66 of the Contracts Act 1950." The appellant, therefore, had to repay the advance received, together with interest. The learned High Court Judge cited *Berjaya Times Square Sdn Bhd v. M-Concepts Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ
F 597 in support.

Decision Of This Court

[11] After hearing respective learned counsel and upon due consideration of their oral submissions, written submissions and the records of appeal, we allowed the appeal. We essentially took the view that the learned High Court
G Judge erred on both counts, in allowing the claim and in dismissing the counterclaim. We found the learned judge's findings, views and application of s. 40 of the Contracts Act 1950 plainly erroneous and must be set right. We further found the termination by the respondent wrong and unlawful, and that the appellant had substantially performed his contractual obligations
H under the oral employment contract. Even if the appellant was in breach, which we did not find to be the case, we also found that the respondent was not entitled to rescission of contract. Consequently, we were amply satisfied that this was a suitable case for appellate intervention and we allowed the appeal and set aside the decision of the High Court. These are our reasons
I in full.

Section 40 Of The Contracts Act 1950

[12] Leaving aside for the moment the question of whether the agreed sum payable to the appellant is RM500,000 or RM1 million, we observe that the sole basis of the respondent's claim is s. 40 of the Contracts Act 1950. The respondent's claim is that because the appellant resigned before the agreed event or time, which is when the project is completed, the appellant has disabled himself from performance of the employment contract. Thus, the respondent is entitled to terminate the contract and sue for recovery of monies paid to the appellant. The reliefs sought included declaratory orders recognising the respondent's entitlement and an order that the appellant refund the RM500,000 that was advanced together with interest.

[13] The learned judge found the claim proved, that the employment contract was a "conditional contract in the sense that the defendant is entitled to receive the sum of RM500,000 only if he continues to serve as the plaintiff's project manager until the project is completed." The money was however, paid to the respondent in advance. According to the learned judge, when the appellant 'accepted the RM500,000 in advance, he has contractually agreed that he will carry out his duty as the project manager until the project is completed." For this reason, the learned judge concluded that this is the "contract for its entirety"; that the relationship between the parties is "not like main contractor and sub-contractor where the amount of work done can be measured by a quantity surveyor"; it is, in effect, a "one-off contract for completion of the project." Her Ladyship found that the appellant knew the respondent "relied on his services to complete the project without any glitches. He also agreed that because of his premature resignation, he had caused hardship to the plaintiff and delay in the project. For these reasons, he ought to have known that the purpose the money was paid in advance was to ensure that he would not leave the plaintiff without fulfilling his promise. The defendant must understand if he resigned before the project is completed, he is not entitled to get RM500,000.

[14] Put another way, the appellant had agreed to be project manager until the project was completed; and it is at that point in time that he will be paid. It is in that sense that the learned judge understood the contract is "for" its entirety. The fact that the payment was in the form of an advance did not alter that agreement. In the learned judge's understanding, the 'entirety' of the contract refers to the appellant staying until the end of the project. Until and unless the project is completed, the appellant cannot leave and will not in fact be paid or be entitled to any payment. Therefore, by all accounts, leaving any sooner would amount to a repudiation of contract entitling the respondent to rescind the contract.

[15] With respect, this conclusion and understanding by the learned judge is plainly erroneous and demonstrates misapprehension of s. 40 of the Contracts Act 1950. That section reads as follows:

> When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuances.

[16] Two illustrations are given in s. 40. Although neither illustration describes the present circumstances, they are insightful as to the meaning and application of s. 40. Both illustrations concerned a contract to perform, that is, to sing for certain number of nights per week for two months. The payments in both cases were at a certain rate per night of performance. In the first illustration, the singer fails to turn up after six nights in which case the manager, the innocent party, is at liberty to put an end to the contract. In the second illustration, the singer similarly fails to turn up on a promised night but turns up subsequently with the assent of the manager. In the second scenario, the contract cannot be put to an end. The remedy is only in damages for the night when the singer did not perform.

[17] To understand s. 40, we will need to "hearken to first principles, for it is a failure to appreciate these, we apprehend, which is the cause of confusion in the mind of the appellant ..." per Gopal Sri Ram JCA (as he then was) in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996] 3 MLJ 675, 681. From the provisions of s. 40, it is apparent that a contract is not automatically brought to an end by a repudiatory breach. The right to terminate or rescind a contract is not available in every case of repudiation. That right is dependent on, *inter alia,* the nature of the term breached, and the conduct of the parties, "whether the breach is of sufficient gravity to allow the other party to rescind the contract" - see Visu Sinnadurai on the "*Law of Contract*" (*supra*), p. 941. In the Court of Appeal's decision in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996] 3 MLJ 675, the "first principles" were reminded and it is the function of the trial court to examine all the evidence led and determine the real facts in order to come to a decision on those material first principles:

> Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, ie, the party who is not guilty of the breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the

> subsidiary term. The rules that operate in this area of the law of obligations produce a further consequence. A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract.
>
> Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed.

[18] At p. 296 (CLJ); p. 682 (MLJ), the Court of Appeal further opined:

> Another approach to the problem in cases that involve synallagmatic contracts is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages but not to treat the contract as being at an end.

[19] Where that right properly exists in law and on the facts, the innocent party can elect to either terminate or rescind or, carry on with the contract. The common law doctrine of election applies. This was explained by Seah FJ in *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; [1984] 2 MLJ 290:

> A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contact the repudiation is what is called *brutum fulman* that is, the parties are left with their rights and liabilities as before.

[20] This was also discussed by the Court of Appeal in *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619; [1998] 3 MLJ 860:

> In other words, the plaintiff could either accept the repudiation by terminating the agreement or he could ignore the breach by treating the contract as alive and subsisting. As a matter of fact as well as on the pleadings, the plaintiff did not terminate the contract despite the repudiation by the first defendant so that the contract is still subsisting

[21] Where the innocent party elects to affirm the contract, the contract is treated as still continuing with the rights and obligations of both parties still intact and, each party has a right to sue the other for damages - see Visu Sinnadurai on the "*Law of Contract*" (4th edn Lexis Nexis), pp. 938 to 940. However, where the election is to terminate, rescind or end the contract by reason of the breach, the innocent party is itself released from further performance of the contract. This was explained by Sir George Rankin in *Muralidhar Chatterjee v. International Film Co Ltd* AIR 1943 30 PC 34, 38;

A [1942] LR 70 IA 35, PC. In that case, the Privy Council was dealing with s. 39 of the Indian Contract Act, which is similar to s. 40 of our Contracts Act 1950:

> In a case within section 39, the party who **rightly** 'puts an end to' or 'rescinds' the contract is entitled to damages for the defaulting party's
B breach. In this sense, the contract has not ceased to be 'enforceable by law'. On the other hand, neither party is any longer bound to perform his promise - indeed an offer to do so, if made by either party, could properly be rejected by the other. The election of the party rescinding, as Cotton LJ once put it, 'relieves the other party from any further obligation under the contract and enables both parties to make arrangements for the future
C on the footing that the contract has been once for all broken and is at an end': *Johnstone v. Milling* (1886) 16 QBD 470. (emphasis added).

[22] The right to terminate may also be waived as happened in the case of *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363; [1983] 1 MLJ 151. There, the Federal Court examined the conduct of the
D parties to see if the right to rescind the contract upon the occurrence of a repudiatory breach had been waived by the other party. Upon examination, the Federal Court found that there was evidence of waiver; consequently, the right to rescind was no longer available and the contract was deemed to be still subsisting.

E

[23] Further, the right to terminate may be lost where the party terminating the contract is in fact guilty of some wrongdoing. In *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; [1987] 1 MLJ 302, the Supreme Court observed:

> F The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do
> G either would be to permit him to take advantage of his own wrong to put an end to the contract, *vide* the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v. SDAECD France* [1919] AC 1.

[24] See also Court of Appeal's decisions in *Ramli Shahdan & Anor v. Motor Insurer's Bureau Of West Malaysia & Anor* [2006] 1 CLJ 224; [2006]
H 2 MLJ 116; *Su Wee Lip @ Philip Su v. Hj Lassim Abdul Rahman* [2009] 1 MLJ 580, *Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd; Soo Yuh Mian (Intervener)* [2011] 3 CLJ 16; [2011] 2 AMR 281.

[25] In order to determine the rights and obligations of the parties, the terms of the oral contract would have to be established. The trial judge was
I obliged to determine not just the promise or what the promise was all about, but also the terms surrounding that promise. Of course, if there were none, it would be proper for the trial judge to rightly say that the promise and thereby the contract was only about the appellant working as the

respondent's project manager until the project is completed at which time the respondent will pay the appellant RM500,000. Because the employment contract is an oral contract, the trial judge must test the oral testimonies against any contemporaneous documents produced and admitted at trial, and explain why one set of evidence is preferred over the other.

[26] The learned judge claimed to have done that; and in so doing found the appellant's agreement to carry out his duty as the project manager until the project is completed to be a one-off contract for completion of the project, and in that sense, a contract for its entirety. The learned judge accepted the respondent's claim that the purpose for which the money was paid in advance was to ensure that the appellant did not leave the respondent without fulfilling his promise. The learned judge rejected the appellant's version of the employment contract because the documentary evidence did not support it.

[27] Again, with respect, the learned judge fell into error. In *Pollack & Mulla: Indian Contract and Specific Relief Acts*, 12th edn vol. 1, p. 1000, the learned authors explained that a refusal to perform any part of the contract, however small, is a refusal to perform the contract 'in its entirety'. The "kind of refusal contemplated in s. 40 is one which affects a vital part of the contract, and prevents the promisee from getting in substance what he bargained for." Section 40 is not about non-performance of contracts for its entirety but about performing contracts in its entirety. This points to the significance of the particular term of the contract which is not performed; it may be a small part or it may be the whole of the agreement; and the issue of substantial performance of that term is also relevant. If the term is not a fundamental term of the contract, and there has been substantial performance, the termination is unlawful. This was, *inter alia*, determined by the Federal Court in *Berjaya Times Square Sdn Bhd v. M Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597:

> Special attention should be paid to the phrase 'in its entirety'. Under the section, the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract.

[28] It is interesting to see the pleaded case of the respondent. At para. 2 of the statement of claim, the respondent pleaded that the appellant was the "former project manager of Pearl Island Resort Development Sdn Bhd and the plaintiff until 17 July 2014". At paras. 3, 4 and 5, the respondent alleged:

> 3. Sometime in 2009 whilst in the employ of Pearl Island Resort Development Sdn Bhd, the defendant orally agreed with the plaintiff for valuable consideration to act and serve as the plaintiff's Project Manager for the project known as 98 Greenlane Lintang Gangsa until the completion of the said project.

A 4. In consideration thereof, the plaintiff specially set aside for the defendant a unit of 3 storey Terrace House, Plot 31, Lot No, 10131 held under HSD 17851, Section 5, DTL George Town, Penang priced at RM1,068,000.00 less RM500,000.00.

5. On 17-07-14 the defendant tendered his resignation to Pearl Island
B Resort Development Sdn Bhd as its Project manager with effect from 17-04-14 and at the same time, disabled himself from the further performance of his promise to the plaintiff in its entirety when the plaintiff's project was still pending completion.

[29] To this, the appellant avers at paras. 2, 4 and 5 of the defence and
C counterclaim, that he was never the respondent's project manager. He was its general manager for the respondent's project. The appellant claimed that he was appointed by Pearl Island Resort Development Sdn Bhd to be its project manager. This issue was later, not pursued.

[30] The appellant claimed that he was not paid any salary by the
D respondent. Instead, the respondent orally agreed to pay the appellant RM500,000 when the building plans for the project were approved and a further sum of RM500,000 when the project was completed. When the plans were approved, the respondent did not pay the appellant the RM500,000 that was agreed. The respondent instead, issued the appellant a credit note in the
E form of a discount for the same amount for the purchase of the unit earlier described.

[31] This version was rejected by the learned judge on the basis that it was an afterthought, not supported by contemporaneous documents and by the overall circumstances of the case. The contemporaneous documents referred
F to by the learned judge appear to be the respondent's solicitors' notice of demand which was unanswered by the appellant. In the learned judge's view, if the appellant "strongly believed he is entitled to RM1 million, he should have replied immediately to the notice of demand, putting his case and claim for RM500,000." The appellant's explanation that he was advised by his
G lawyer to not reply was rejected by the court.

[32] We are of the view that in the first place, the notice of demand is not contemporaneous documentary evidence of the employment contract. This notice was issued in anticipation of a civil claim. It was incumbent on the trial judge to inquire as to the terms and conditions of the employment
H contract, what were the particular functions of a project manager, whether there was any truth or explanation as to the matters relied on by the appellant. Surely the employment contract cannot be about being a project manager for a duration, period. That engagement must logically and reasonably entail certain responsibilities and functions required of the
I appellant as project manager. These matters required examination in order to answer the issue of fundamental term. Had the learned judge examined the evidence properly, Her Ladyship would have found that the respondent did

not dispute the functions described by the appellant; that in fact, the respondent agreed that the appellant was responsible for and had procured the necessary approvals and re-approvals when the plans were amended.

[33] In this regard, the evidence shows that the planning permission was given by the local authority on 16 December 2009 while the building plan was approved on 19 May 2010. Subsequently, an amended building plan was submitted and this amended plan was approved on 18 April 2012. Not only are there minutes of meetings to support these various actions of the appellant (see pp. 191, 195 and 201 of the record of appeal Jil. 2), but as already mentioned, the respondent has actually admitted to this effect. These are all silent, incontrovertible, independent and contemporaneous documentary evidence which the learned judge failed to have given any due regard. These pieces of evidence support the appellant's version of the terms of the employment contract, that he was engaged not just as project manager but as the person responsible for liaising with the relevant authorities so that the relevant approvals necessary for the project may be procured. This role is indeed an important role for the appellant as the lack of approvals will have adverse implications on the progress of the project. The absence of approvals must mean that the project simply cannot proceed.

[34] The learned judge did not give any weight to these evidence but instead, focused almost completely on the question of duration of the employment. We are of the view that this is erroneous given that this is an oral contract and it was incumbent upon the learned judge to ascertain the precise terms of the contract. Aside from that, it cannot be denied that there has been substantial performance of the employment contract by the appellant. This means that even if the appellant was in breach for leaving the respondent's employment before the completion of the project, the respondent is not entitled to terminate the employment contract under s. 40.

[35] We further find irresistible inference offered by the SPA which supports the appellant's case, which evidence was ignored by the learned judge. The SPA for the sale of the 3-storey house to the appellant is dated 10 January 2013 and the documents issued in relation to the SPA are more consistent with the appellant's version of the terms of the agreement. Again, this was not considered by the learned judge. From the pleaded case that was pointed out earlier, the respondent's case is that the RM500,000 was advanced. This must have been around 2009, when the appellant was first engaged as project manager. Yet, the evidence at trial was that the SPA was not signed until 10 January 2013. The SPA was followed by a credit note issued on 12 May 2014 and the respondent issued a letter dated 15 May 2014 to the appellant's lawyers in respect of the sale (see pp. 259 and 212 of the record of appeal Jil. 2). The dates of the SPA, credit note and the letter to the lawyers for the SPA indicate that RM500,000 was discounted from the

A sale of the property with a credit note for the balance were events which took place long after the employment contract had come into existence in 2009. All this shows that the terms of the employment contract are as explained by the appellant.

[36] The appellant's promise to stay until the end of the project is not a B term which is fundamental to or is at the root of the employment contract. What is fundamental are the significant responsibilities that the appellant was entrusted with and which he had attended to successfully. Consequently, while the appellant may have left the respondent's employment at a date earlier than anticipated, he was not in breach of a fundamental term when C he left. On examination of the reasons for that action, it is apparent that the appellant's decision to leave was brought about by the respondent's own breach in not paying the appellant the agreed sum of RM1 million, after he had substantially and successfully performed the duties expected of him. As the party in breach, the respondent is not entitled to terminate the contract.

D **[37]** What is further overlooked by the learned judge is the fact that even if for a moment the respondent has a right to terminate, the respondent has waived that right when it accepted the appellant's resignation without reservation or terms. Again, this is not in dispute. In our view, the respondent's demand, issued more than a year later, is more in the nature of E an afterthought. At the material time of acceptance of resignation, there was no reference to the letter of appointment or to its terms; if it is as critical as now suggested by the respondent. Consequently, the respondent is not entitled to terminate the oral employment contract and to a refund of the advance.

F **[38]** We are compelled to add that we agree with learned counsel for the appellant that the respondent has in any case, not adduced any evidence of loss. The sum of RM500,000 cannot be ordered to be returned under ss. 65 and 66 of the Contracts Act 1950 given that the validity of the oral contract was never in issue. If any compensation was due to the respondent, it would G be by virtue of s. 74 and not, as discussed by the learned judge.

[39] For all the foregoing reasons, the appeal against the decision in respect of the respondent's claim must be allowed with costs.

[40] As for the counterclaim for delivery of vacant possession, this was H dismissed by the learned judge on the basis that the appellant was disentitled to his claim under the SPA by reason of his conduct under the employment contract.

[41] Once again, we find this determination clearly erroneous on the facts and in law. The arrangements between the parties in relation to the SPA are I entirely separate and distinct from those that arise under the employment contract. Undisputedly, the appellant has paid the full purchase price - see the credit note and the bank loan. Under the terms of the SPA, the respondent

is further required to deliver up vacant possession. This would have been on 2 March 2015. In the event the respondent, as vendor under the SPA fails to deliver up vacant possession, cl. 22 of the SPA provides:

22. Time for delivery of vacant possession

(1) Vacant possession of the said Building shall be delivered to the Purchaser in the manner stipulated in clause 23 within twenty four (24) calendar months from the date of this Agreement.

(2) If the Vendor fails to deliver vacant possession of the said Building in the manner stipulated under clause 23 within the time stipulated in sub-clause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per cent, (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession of the said Building. Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Building.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Building.

[42] Clause 23 of the SPA provides:

23. Manner of delivery of vacant possession

(1) The Vendor shall let the Purchaser into possession of the said Property upon the following:

(a) the issuance of a certificate of completion and compliance certifying that the said Building has been duly constructed and completed in conformity with the approved plans and the requirements of the Street, Drainage and Building Act 1974 and any by-laws made thereunder;

(b) water and electricity supply are ready for connection to the said Building; and

(c) the Purchaser having paid all monies payable under sub-clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having perfumed and observed all the terms and covenant on his part under this Agreement.

(2) The delivery of vacant possession by the vendor shall be supported by a certificate of completion and compliance certifying that the said Building is safe and fit for occupation and includes the handing over of the keys of the said Building to the Purchaser.

(3) Upon the expiry of fourteen days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Property, whether or not the Purchaser has actually entered possession or occupation of the said Property, the Purchaser shall be deemed to have taken delivery of vacant possession.

[43] The SPA under consideration is a standard statutory contract prescribed under s. 24 of the Housing Development (Control and Licensing) Act 1966 read together with reg. 11 of the Housing Development (Control and Licensing) Regulations 1989 and Schedule G to the Regulations. Since it is not in dispute that the subject property under the SPA was completed in January 2015 and ready for delivery of vacant possession in March 2015, the respondent's failure and refusal to deliver vacant possession under the SPA to the appellant amounts to a breach of the clear terms of the SPA. Even if the appellant was in breach of the oral employment contract, which we do not find to be the case, that breach is unrelated to the respondent's obligations under the SPA.

[44] For the reasons set out above, the appellant is entitled to an order for specific performance of the terms of the SPA. The respondent is obliged to hand over vacant possession and pay liquidated damages for the late delivery as per the terms of cl. 22. Liquidated damages for such late delivery shall run from 10 January 2015 at the rate of 10% per annum of the purchase price, which we take should be the full and not the discounted price.

[45] Consequently, the appeal on the cross-appeal is also allowed. The decision of the High Court is set aside. The respondent's claim is dismissed and the appellant's counterclaim is allowed in the terms sought with costs of RM30,000 subject to payment of allocator. The deposit is ordered to be refunded to the appellant.